

STATE OF MICHIGAN
COURT OF APPEALS

ELIZABETH SOSS,

Plaintiff-Appellee,

v

WHITEFORD TOWNSHIP, WHITEFORD
TOWNSHIP CLERK, WHITEFORD TOWNSHIP
BUILDING INSPECTOR and WHITEFORD
TOWNSHIP BOARD,

Defendant-Appellees,

and

GATEWAY FIREWORKS, L.L.C.,

Intervening Defendant-Appellant.

GATEWAY FIREWORKS, L.L.C.,

Plaintiff-Appellant,

v

WHITEFORD TOWNSHIP,

Defendant-Appellee,

and

ELIZABETH SOSS,

Intervening Defendant-Appellee.

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

UNPUBLISHED

October 4, 2007

No. 278914

Monroe Circuit Court

LC No. 07-023214-CH

No. 278915

Monroe Circuit Court

LC No. 07-023428-CH

In these consolidated appeals, Gateway Fireworks, L.L.C. (“Gateway”), appeals as of right the order of the trial court granting the relief sought by Elizabeth Soss, including a writ of mandamus ordering the Whiteford Township Clerk (“the clerk”) to find as adequate a petition for referendum filed by Soss, and including a determination that a zoning ordinance change previously approved by the Whiteford Township Board of Trustees (“the board”) could not take effect unless approved by a majority of registered township electors. Further, the order denied Gateway’s motion for summary disposition, with the court finding, as a matter of law, that Gateway had not obtained vested rights in a prior nonconforming use of the property. We affirm.

These cases arise out of a zoning change adopted by the board relative to the subject property that would allow the property to be used, as desired by Gateway, for the retail sale of fireworks (hazardous materials district), a use not previously permitted (highway business district). Soss, however, circulated a petition under authority provided by MCL 125.3402 in an effort to challenge the zoning change and to place the matter before township voters, and she succeeded in timely obtaining the necessary number of signatures. But the clerk, making an adequacy determination as required by MCL 125.3402, found that the petition was inadequate, thereby rendering the board’s zoning change effective. Prior to Soss filing a complaint challenging the clerk’s determination, Gateway proceeded to enter into a purchase agreement for the property, obtain financing, close on the sale, contract for engineering and architectural services with respect to constructing a building for retail fireworks sales, obtain site plan approval, enter into a contract for construction of the building, acquire various required permits, have the construction company construct, offsite, a 5,000 square foot prefabricated building, commence some preliminary grading, fencing (soil erosion), curbing, and excavation work, obtain surveys and well-drilling services, and to put approximately \$1.4 million into the project.

On appeal, Gateway argues that the trial court erred in ruling that it had not acquired vested rights to develop and use the property as a retail fireworks business.¹ The principle relied on by Gateway is recited in *Heath Twp v Sall*, 442 Mich 434, 439; 502 NW2d 627 (1993),

¹ Principles governing summary disposition under MCR 2.116(C)(10) are implicated in these appeals. This Court reviews de novo a trial court’s decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

wherein our Supreme Court stated that “[a] prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation’s effective date.” Gateway’s argument fails on the record presented as a matter of law.

In *Belvidere Twp v Heinze*, 241 Mich App 324, 328; 615 NW2d 250 (2000), this Court stated:

A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date. To establish a prior nonconforming use, a property owner must engage in work of a substantial character done by way of preparation for an actual use of the premises. The work of substantial character must be toward the actual use of the land for the nonconforming purpose. The actual use that is nonconforming must be apparent and manifested by a tangible change in the land, as opposed to intended or contemplated change by the property owner. Thus, to constitute a legally cognizable nonconforming use, work of a substantial nature beyond mere preparation must materially and objectively change the land itself. [Citations omitted.]

While we recognize, as indicated above, that Gateway engaged in numerous preparatory activities relative to the plan of eventually locating a retail building on the property from which fireworks would be sold, it cannot be said that the work was of a substantial character such that a nonconforming use was apparent and manifested by a tangible change in the land. Indeed, the following facts claimed by the defendant in *Belvidere Twp*, *id.* at 328-329, which are comparable to the factual claims here, were rejected as insufficient by this Court:

Defendant argues that he established a vested nonconforming use [as a hog facility] before May 7, 1998, by (1) purchasing the land, (2) acquiring financing, (3) hiring a designer for the farm and manure pits, (4) obtaining quotes for the costs of buildings and materials and entering into contracts with suppliers, (5) purchasing insurance, (6) grading the site, (7) staking the location of the barns and manure pits, (8) applying for well and sediment control permits, (9) constructing the manure pits and sewage system, and (10) building an access road and installing a culvert.

In *Schubiner v West Bloomfield Twp*, 133 Mich App 490, 501; 351 NW2d 214 (1984), this Court stated:

Under all of the cases cited herein a building permit, or its counterpart, a permit to commence operations, is the *sine qua non* for obtaining “vested rights.” An approved site plan is not a permit to build. The features of reliance and estoppel which may give rise to a vested right under a building permit do not necessarily arise under an approved site plan which, by statute, merely signifies that the proposed use complies with local ordinances and federal statutes. Furthermore, the grant of a permit to build does not in itself confer on the grantee “vested rights.” Actual construction must commence. The making of preparatory

plans, landscaping, and the removal of an existing structure is not sufficient.
[Citations omitted.]

Thus, Gateway's building permit alone was insufficient, where substantial onsite construction of a building for selling fireworks had not been completed.² Further, *Sall, supra* at 437, 447-448, indicated that developing construction plans, procuring permits, excavating and plumbing, purchasing sewer pipe, drilling wells, constructing a wellhouse, installing test wells, excavating for planned roads, removing topsoil, clearing trees, and obtaining a topographical survey were in sum insufficient to establish a prior nonconforming use. Moreover, in *Bevan v Brandon Twp*, 438 Mich 385, 401; 475 NW2d 37 (1991), our Supreme Court stated that ordering plans and removing old buildings are insufficient to establish a prior nonconforming use and that the test does not involve whether a little or a lot was spent in reliance on past zoning classifications.

Furthermore, in *Gackler Land Co, Inc v Yankee Springs Twp*, 427 Mich 562, 567, 576; 398 NW2d 393 (1986), the property owner argued that he had acquired vested rights in the use of the property as a single-wide mobile home park by surveying the plat, constructing a road, completing grading and excavating work, and installing 11 single-wide mobile homes. The Supreme Court found that the construction did not constitute "work of a substantial character which makes apparent an actual [nonconforming] use," because the work "rendered the lots equally suitable for the placement of single-wide mobile homes and conventional dwellings." *Id.* The Court agreed with the trial court that even the presence of the 11 mobile homes did not establish an actual nonconforming use with respect to the vacant lots, where those lots "would sell for conventional or modular home occupancy" under the right conditions. *Id.* Because construction of a substantial character therefore means construction that reflects or makes apparent the actual nonconforming use, and given that the alleged prior nonconforming use here was the operation or building of a retail fireworks store, we fail to see how any work on the property completed by Gateway reflected or made apparent such a nonconforming use, as opposed to laying the groundwork for any other type of store that could have fit the highway business district classification. Reversal is unwarranted.

Gateway's next argument on appeal is that Soss's request for mandamus was barred by laches. We disagree.

² Gateway's reliance on *Dingeman Advertising, Inc v Algoma Twp*, 393 Mich 89; 223 NW2d 689 (1974), with respect to the offsite prefabricated building is misplaced because, ultimately, additional construction completed on the land in *Dingeman* was important to the reasoning and outcome of the case. *Dingeman* involved a billboard, and a large portion of the frame structure for the billboard had been built onsite. Given the nature of the structure, clearly indicating the placement of a billboard, and that the alleged nonconforming use was the placement of a billboard, the case is distinguishable from the case at bar, where Gateway's onsite activities did not reach a comparable level in relation to reflecting the building of a fireworks store.

The doctrine of laches applies where it would be inequitable to enforce a claim because of the passage of time and changed conditions. *Chase v Terra Nova Industries*, 272 Mich App 695, 701-702; 728 NW2d 895 (2006). Under the doctrine, the defendant bears the burden of proving that a lack of due diligence on the part of the plaintiff resulted in prejudice to the defendant. *Id.* at 702.

Here, only a few short months passed between the clerk's rejection of the petition and the filing of the complaint by Soss, and we do not find a lack of due diligence on the part of Soss under the circumstances presented.

Gateway's final argument on appeal is that the trial court erred in issuing the writ of mandamus that ordered the clerk to declare the referendum petition adequate and that ordered the clerk and the board to submit the zoning change to township voters.

We review a trial court's decision with respect to an order of mandamus for an abuse of discretion. *Baraga Co v State Tax Comm*, 466 Mich 264, 268-269; 645 NW2d 13 (2002).³ However, we review issues of statutory interpretation de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

The issue in this case involves identifying the nature and extent of the township clerk's duty to determine the adequacy of a petition requesting the submission of a zoning ordinance to the electors. The relevant statute is MCL 125.3402, which provides:

(1) Within 7 days after publication of a zoning ordinance under section 401, a registered elector residing in the zoning jurisdiction of a county or township may file with the clerk of the legislative body a notice of intent to file a petition under this section.

(2) If a notice of intent is filed under subsection (1), the petitioner shall have 30 days following the publication of the zoning ordinance to file a petition signed by a number of registered electors residing in the zoning jurisdiction not less than 15% of the total vote cast within the zoning jurisdiction for all candidates for governor at the last preceding general election at which a governor was elected, with the clerk of the legislative body requesting the submission of a

³ "To obtain a writ of mandamus, the plaintiff must show that (1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial in nature, and (4) the plaintiff has no other adequate legal or equitable remedy." *White-Bey v Dep't of Corrections*, 239 Mich App 221, 223-224; 608 NW2d 833 (1999). "Mandamus will not lie to control the exercise of discretion or for the purpose of reviewing, revising, or controlling the exercise of discretion of administrative bodies, but will lie to require a body or an officer charged with a duty to take action on the matter." *PT Today, Inc v Comm'r of the Office of Financial & Ins Services*, 270 Mich App 110, 133; 715 NW2d 398 (2006).

zoning ordinance or part of a zoning ordinance to the electors residing in the zoning jurisdiction for their approval.

(3) Upon the filing of a notice of intent under subsection (1), the zoning ordinance or part of the zoning ordinance adopted by the legislative body shall not take effect until 1 of the following occurs:

(a) The expiration of 30 days after publication of the ordinance, if a petition is not filed within that time.

(b) If a petition is filed within 30 days after publication of the ordinance, the clerk of the legislative body determines that the petition is inadequate.

(c) If a petition is filed within 30 days after publication of the ordinance, the clerk of the legislative body determines that the petition is adequate and the ordinance or part of the ordinance is approved by a majority of the registered electors residing in the zoning jurisdiction voting on the petition at the next regular election or at any special election called for that purpose. The legislative body shall provide the manner of submitting the zoning ordinance or part of the zoning ordinance to the electors for their approval or rejection and determining the result of the election.

(4) A petition and an election under this section are subject to the Michigan election law, 1954 PA 116, MCL 168.1 to 168.992.

Gateway argues on appeal that the clerk's adequacy determination encompasses the duty to evaluate referendum petitions under Michigan election law and that the petition filed by Soss was inadequate under MCL 168.485, where it was confusing, misleading, and prejudicial. Gateway's argument that it was appropriate for the clerk to reject the petition under MCL 168.485 is unfounded because that provision clearly applies to ballot language, rather than petition language. Moreover, under MCL 125.3402(3)(c), it is for the board, rather than the clerk, to formulate ballot language and ensure that it is not prejudicial to either side.

Alternatively, Gateway argues that, even if MCL 168.485 does not apply, and even if the clerk's review was limited to an evaluation of the signatures on the petition, the clerk acted within her authority to determine the adequacy of the petition because she could have found that, in light of the alleged misleading language, the signatures amounted to forced signatures. We disagree. In *Grabow v Macomb Twp*, 270 Mich App 222, 230-231; 714 NW2d 674 (2006), this Court noted that, "[i]n general, municipal clerks are charged only with ministerial duties and do not have judicial authority to perform such functions as statutory construction." The duties of a township clerk are prescribed by statute, *id.*, and review of the relevant statutory language concerning the clerk's adequacy determination here must begin with MCL 125.3402. The wording in the statute that can reasonably be connected to the "adequacy" determination is the language providing that "the petitioner shall have 30 days following the publication of the zoning ordinance to file a petition signed by a number of registered electors residing in the zoning jurisdiction not less than 15% of the total vote cast within the zoning jurisdiction for all candidates for governor at the last preceding general election at which a governor was elected[.]" MCL 125.3402(2). Thus, we conclude that the clerk's adequacy finding involves determining

whether the petition was timely filed, whether it was signed by registered voters, whether the voters resided in the applicable jurisdiction, and whether the required number of registered voters signed the petition, which includes a determination of the number of voters who participated in the last general election in which a governor was elected. Satisfaction of those matters or requirements are not in dispute here. It can also be gleaned from the statute that, because the petition must request the submission of a zoning ordinance or part of a zoning ordinance to the electors, MCL 125.3402(2), the petition must include the basic information concerning the nature of the zoning action at issue upon which the electorate could potentially vote. And this must be included in the clerk's adequacy determination. Here, the petition sufficiently requested a vote by the electorate on the zoning change from a highway business district to a hazardous materials district with respect to the property. Accordingly, the trial court did not err in its ruling.

To the extent that some of the statutory provisions related to referendums are implicated in this case because of the language in MCL 125.3204(4), which incorporates Michigan election law, MCL 168.1 *et seq.*, we find no basis in these statutes for the clerk to have rejected the petition, nor does Gateway argue to the contrary, other than as to MCL 168.485, which argument was rejected above. See MCL 168.488(2); MCL 168.482(1), (4), (5), and (6); MCL 168.544c(2). Accordingly, reversal is unwarranted, and the trial court had the authority under MCL 125.3204 to order the township to hold an election on the zoning change.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Bill Schuette